No. 82-52

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Supreme Court of the United States
OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,
Petitioners,

—v.—

NATHALIE NORRIS, on behalf of herself and all others similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, WOMEN'S EQUITY ACTION LEAGUE, PENSION RIGHTS CENTER, WOMEN'S LEGAL DEFENSE FUND, WOMEN EMPLOYED, EQUAL RIGHTS ADVOCATES, INC., NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN JEWISH COMMITTEE, NEW YORK COUNTY LAWYERS' ASSOCIATION, DISPLACED HOMEMAKERS NETWORK, INC., NORTHWEST WOMEN'S LAW CENTER, NATIONAL WOMEN'S POLITICAL CAUCUS, AMERICAN JEWISH CONGRESS, NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC., COAL EMPLOYMENT PROJECT, NATIONAL COUNCIL OF JEWISH WOMEN, WOMEN'S AMERICAN ORT, FEDERALLY EMPLOYED WOMEN'S LEGAL AND EDUCATION FUND, AMERICAN VETERANS COMMITTEE, OLDER WOMEN'S LEGAL AND EDUCATION FUND, AMERICANS FOR DEMOCRATIC ACTION, NOW LEGAL DEFENSE AND EDUCATION FUND, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Fitzpatrick v. *Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *rev'd on other grounds*, 519 F.2d 559 (2d Cir. 1975), *aff'd in part, rev'd in part on other grounds*, 427 U.S. 445 (1976) 20, 22, 28

Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) 26

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Hutto v. *Finney*, 437 U.S. 678 (1978) 28

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Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 (1978) ..... *passim*

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McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 26

Mississippi University For Women v. *Hogan*, __ U.S. __, 102 S. Ct. __, 73 L.Ed. 2d 1090 (1982) 24

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Nashville Gas Co. v. *Satty*, 434 U.S. 136 (1977) 27

Norris v. *Arizona Governing Committee*, 486 F. Supp. 645 (D. Ariz. 1980); *aff'd*, 671 F.2d 330 (9th Cir. 1982), *cert. granted* Docket No. 82-52 (Oct. 12, 1982) 6, 21

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Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 (1979) 25

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Peters v. *Missouri Pacific R.R.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973) 20

Peters v. *Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, Docket No. 82-794 (Nov. 10, 1982) 11, 14, 21

Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) 26

Probe v. *State Teachers Retirement System*, 27 FEP Cases 1306 (C.D. Cal. 1981) 21

Reilly v. *Robertson*, 266 Ind. 29, 360 N.E. 2.d 171, *cert. denied*, 434 U.S. 825 (1977) 25

Retired Public Employees' Association of California v. *California*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, Docket No. 82-262 (Aug. 14, 1982) 21

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Texas Dept. of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 26

Washington v. *Davis*, 426 U.S. 229 (1976) 25

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Statutes and Regulations:

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Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103, *see* 42 U.S.C. §§ 2000e(a) and (f)..... 17

McCarran-Ferguson Act, Section 2(b), 59 Stat. 34, 15 U.S.C. § 1012(b)..... 6

Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, Oct. 31, 1978, 42 U.S.C. § 2000e(k)...13, 27

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29 C.F.R. § 1604.9(f)..... 20

29 C.F.R. § 1620.4 (Proposed)..... 20

29 C.F.R. § 1620.5 (Proposed)..... 20

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Legislative Materials:

H.R. Rep. No. 92-238, 92d Cong., 2d Sess. (1971) [To accompany H.R. 1746], *reprinted in* 1972 U.S. Code Cong. & Ad. News 2141 17

H.R. Rep. No. 95-948, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749..... 13

H.R. Rep. No. 95-1445, 95th Cong., 2d Sess. 50-53, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7088-7091 ..... 2, 12

S. Rep. No. 95-1263, 95th Cong., 2d Sess. 63-65, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6826-6828..... 2, 12

Legislative History of the Employment Income Security Act of 1974 (1976) 13

Congressional Research Service Report Prepared For The Subcommittee On Retirement Income And Employment Of The House Select Committee On Aging, 96th Cong., 1st Sess., *Women and Retirement Income Programs: Current Issues of Equity and Adequacy* (Comm. Pub. No. 96-190) (1979).....19, 20

Other Authorities:

Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489 (1982)..... 18

Brilmayer, Hekeler, Laycock, and Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. Chi. L. Rev. 505 (1980)..... 18

PAGE

Fellers and Jackson, *Non-Insured Pension Mortality: The UP-1984 Table*, Presentation at the Joint Program Conference of Actuaries in Public Practice, Society of Actuaries (May 1975).....18, 28, 29

M. James, *The Metropolitan Life: A Study In Business Growth* (1947)..... 18

A. Munnell, *The Economics of Private Pensions (1982)* 13

President's Commission on Pension Policy, *Coming Of Age: Toward A National Retirement Income Policy* (February 26, 1981) 3

Restatement (Second) Of Agency § 214 15

Taxation and Finance (BNA) No. 88 (May 5, 1978).... 12

U. of Minnesota Adopts Unisex Plan for Pensions: "Right Thing To Do," Chronicle of Higher Education 25 (October 13, 1982)..... 29

Women's Studies Program and Policy Center at George Washington University, *Older Women: The Economics Of Aging* (1980) 20

INTEREST OF AMICI CURIAE

This brief *amici curiae* in support of Respondents* is submitted on behalf of the American Civil Liberties Union, Women's Equity Action League, Pension Rights Center, Women's Legal Defense Fund, Women Employed, Equal Rights Advocates, Inc., National Women's Law Center, American Association of University Women, American Jewish Committee, New York County Lawyers' Association, Displaced Homemakers Network, Inc., Northwest Women's Law Center, National Women's Political Caucus, American Jewish Congress, National Federation of Business and Professional Women's Clubs, Inc., Coal Employment Project, National Council of Jewish Women, Women's American ORT, Federally Employed Women's Legal and Education Fund, American Veterans Committee, Older Women's League, Americans for Democratic Action, and NOW Legal Defense and Education Fund. Each of these organizations is dedicated to the principle of equal treatment under the law, and the elimination of gender-based discrimination in the workplace.**

This case poses issues of great importance to the rights of individual women workers covered by employee retirement benefit plans, an increasingly valuable fringe benefit of employment. The eradication of overt sex discrimination in the payment of employee fringe benefits is essential if women workers are ever to achieve economic equality in the workforce. Payment of employee retirement benefits based on sex-distinct mortality tables perpetuates the second-class status of women workers by guaranteeing that, upon retirement, women will be relegated to a lower standard of living. *Manhart* forbids such a result. As properly held by the courts below, an employer such as the State of Arizona bears full responsibility under Title VII for the discriminatory provision of fringe benefits, and cannot escape liability by contracting with third parties for express discrimination against its female employees.

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* Letters from counsel for both Respondents and Petitioners consenting to the filing of this brief are being filed with the Clerk.

** Statements describing each organization are set forth in the Appendix of this brief.

STATEMENT OF THE CASE

Nathalie Norris and a class of women employed by the State of Arizona brought this Title VII action in 1978, charging that the state's deferred compensation plan unlawfully discriminated on the basis of sex by providing smaller monthly retirement annuity benefits to women than to identically situated men. The issue posed by this case is whether, consistent with Title VII, Arizona may establish as a fringe benefit a deferred compensation plan which pays differential sums to men and women, based not on individual characteristics such as medical history, weight, smoking, or alcohol consumption, but solely on the sex of the employee.

A. Background

Arizona established the challenged plan[1] approximately ten years ago as a fringe benefit to provide supplemental retirement benefits to certain state employees.[2] Arizona confronts the problem, common to government employers, of attracting

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1 For a description of the development, characteristics, and unique tax status of state government deferred compensation plans such as Arizona's, see the discussion in the legislative history of Section 131 of the Revenue Act of 1978, Public Law 95-600 in H.R. REP. NO. 95-1445, 95th Cong., 2d Sess. 50-53, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7088-7091; S. REP. NO. 95-1263, 95th Cong., 2d Sess. 63-65, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6826-6828.

2 Arizona's Deferred Compensation Plan states its purpose as follows:

> . . . [T]he purpose of [the plan] is to *attract and hold certain individuals* by permitting them to enter into agreements with the Committee which will provide for *monthly payments on retirement*, as well as death benefits in the event of death before or after retirement.

Joint Stipulated Statement of Facts (J.A. 10), Exhibit 10, p. 10; Exhibit 11, p. 10 (emphasis added).

The benefits provided by this supplemental plan do not affect the amount of benefits provided under the state's primary retirement plan, which are provided on a sex-neutral basis. *See* A.R.S. § 38-874A; Exhibit 10, p. 9, 15; Exhibit 11, p. 1; *see also* Pet. Br. at 3 n. 4.

and retaining a highly qualified senior workforce in the face of competition from more lucrative jobs in private industry. In an attempt to make government employment more attractive, Arizona and other public employers have adopted a series of fringe benefits, ranging from enhanced job security to generous retirement benefits.[3] Among the most significant of such fringe benefits for senior employees is the option to defer receipt of a portion of a state employee's present compensation. Deferred compensation plans enable employees to defer a portion of their taxable income until retirement, at which time they are, presumably, taxed at a lower bracket. The deferred compensation plan is of particular importance, therefore, in recruiting and retaining senior or highly qualified employees whose salaries place them in a relatively high tax bracket.[4]

Pursuant to IRS guidelines, which were substantially codified as Section 131 of the Revenue Act of 1978,[5] Arizona employees are permitted to defer the payment of income taxes not only on the deferred wages, but also on the interest such

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3 For example, about 85% of state and local workers are covered by pension plans, compared to about half of the private work force. Moreover, on the average, public sector plans pay higher benefits than private sector plans. *See* PRESIDENT'S COMMISSION ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY 12, 16 (February 26, 1981).

4 When, in 1972, the Internal Revenue Service issued its first favorable private letter ruling authorizing a state or local government employer to establish a nonqualified deferred compensation plan for all or a part of its workforce, Arizona promptly enacted A.R.S. §§ 38-871 through 874, providing for a voluntary deferred compensation plan.

When an unfunded, nonqualified plan is maintained by a governmental unit or a church, the plan may cover all or any part of the employer's workforce. Under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), other employers may maintain such plans only to provide benefits in excess of those permitted under qualified plans, or to provide deferred compensation for a group of employees consisting primarily of highly compensated or management employees. *See* note 1, *supra*.

5 Pub. L. 95-600, Title I, § 131(a), Nov. 6, 1978, 92 Stat. 2779, *see* 26 U.S.C. § 457.

deferred wages earn. In order to avoid the immediate recognition of income by the employee pursuant to the "constructive receipt" or "economic benefit" doctrines,[6] the deferred wages and accrued interest may not be held in a funded or secured plan and must continue to be treated as the property of the employer. Thus, the deferred wages remain at all times subject to the claims of the employer's creditors.[7] Employees are permitted, however, to suggest the appropriate investment vehicle for the deferred wages from among options provided by the employer, although legal control over the deferred wages—including the legal right to decline to accede to an employee's investment or payout preference—continues to rest with Arizona until actual receipt by the employee.[8]

When a participating employee reaches retirement, the employee may receive the accumulated amount of deferred wages and accrued interest over time in the form of a life-time annuity or periodic payments over a specified term of up to 15 years, or may elect to receive the funds in a lump sum.[9]

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6 *See* note 1, *supra*. Unfunded, nonqualified deferred compensation plans were first developed by private employers as a result of Rev. Rulings 68-99, 1968-1 C. B. 193 and 72-75, 1972-1 C. B. 127, which discussed the applicability of the constructive receipt doctrine to such deferred compensation arrangements.

7 *See* Exhibit 10, pp. 4, 7, 16, Deferred Compensation Plan, Part XIII; Exhibit 11, pp. 4, 7, 15, Plan, Part XIII.

8 *See* Exhibit 10, Deferred Compensation Plan, Part V, §§ 5.01-5.02; Exhibit 11, Plan, Part V, §§ 5.01-5.02.

9 Because the principal attraction of the deferred compensation plan is tax savings, it will generally be self-defeating to elect a lump sum payment in a single tax year (no "rollover" is permitted). Unless an employee has only a small amount accumulated, the election of a lump sum payment will force the employee to pay income taxes on the deferred income (and accrued interest) at rates at least as high (and possibly higher) than the employee would have paid in the absence of the plan. To the extent women employees are subjected to pressures to "select" the lump sum option as a means of avoiding the discriminatory annuity option, they may be deprived of the principal benefit of a plan which may well have induced them to enter or to remain in government service in the first place.

Because of the tax benefits associated with deferred compensation (and in the hope of providing a secure retirement income), most employees elect the life-time annuity option, which entitles an employee to receive a fixed monthly payment until death.[10]

When Arizona invited bids by insurance companies to act as investment vehicles for its deferred compensation plan, it made no attempt to assure that the annuity payments to Arizona retirees would be nondiscriminatory.[11] In fact, each of the group annuity contracts entered into by the state under the deferred compensation plan provides for calculation of benefits pursuant to sex-based mortality tables, resulting in a lower monthly payment to individual women than to individual men who have deferred the identical amounts of income.[12] Thus, despite the fact that women and men may defer identical amounts of their wages and despite the fact that 84 percent of women will not live longer than their male counterparts,[13] all individual women receive lower monthly annuity payments than identically situated individual men, solely because they are women.

10 As of August 18, 1978, a total of 1,675 employees were participants in the plan, including 681 women. Of the 681 participating women, 572 have tentatively elected an annuity option. As of the same date, 10 women had retired, with 4 electing a life-time annuity payout. J. A. 6.

11 The state's governing committee promulgated rules and regulations to provide "safeguards to employee participants" and guidelines for companies interested in presenting offers for selection as funding media. J. A. 6; Exhibit 1, R2-9-01. The rules outline procedures and standards for selection of funding media and provide marketing controls regulating the contacts with state employees by funding media. Exhibit 1, R2-9-06, R2-9-09, R2-9-20. At no time did the committee require funding media to provide sex-neutral benefits.

12 Each of the group annuity contracts provides that the state of Arizona is the contract holder, that sex-differentiated annuity payments under contract are made to the contract holder, and that only the contract holder (and not the employees) can amend the contract. *See* J. A. 7-8; Exhibits 3-7.

13 *See Norris* v. *Arizona Governing Committee*, 671 F.2d at 332 n. 1.

B. Proceedings Below

The district court ruled below on cross motions for summary judgment that the state's plan violated Title VII[14] under the reasoning of *Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978). The district court enjoined the state from carrying out its obligations under the deferred compensation plan through the use of sex-based actuarial tables and ordered that future annuity payments to retired women employees be made equal to those for similarly situated male employees. *Norris* v. *Arizona Governing Committee*, 486 F. Supp. 645, 652 (D. Ariz. 1980).

On Arizona's appeal, the Ninth Circuit Court of Appeals affirmed. The Court of Appeals held first that the deferred compensation plan was a "privilege" of employment and a "fringe benefit," and therefore covered by Title VII, regardless of its voluntary nature. *Norris* v. *Arizona Governing Committee*, 671 F.2d 330, 333 (9th Cir. 1982). It then rejected the argument made by Arizona and *amicus* American Council of Life Insurance that the McCarran-Ferguson Act prohibits the application of Title VII to the plan,[15] since the insurance

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14 Norris and the plaintiff class additionally claimed that the Plan violated the equal protection clause of the Fourteenth Amendment. The district court rejected this claim, 486 F. Supp. at 651 (emphasis added), based upon the following analysis:

> Since the Arizona statute is gender-neutral on its face, the Court must then consider whether the classification itself, covert or overt, *if not based upon gender results nevertheless in an adverse effect* which reflects invidious gender based discrimination. . . . The Court finds that it does not.

The district court failed to consider that the group annuity contracts entered into by the state's governing committee used overt sex-based classifications. The Fourteenth Amendment ruling of the district court was not appealed, however, and is not before this Court.

15 The McCarran-Ferguson Act, Section 2(b), 59 Stat. 34, 15 U.S.C. § 1012(b), states in relevant part as follows:

> No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

companies had not been ordered to discontinue the use of sex-segregated annuity tables, no state law regulating insurance had been affected, and "[a]ll the court has done is to tell the employer that it may not offer a fringe benefit which treats an individual woman differently than an individual man." *Id.* at 333. The Court of Appeals rejected each of Arizona's attempts to evade the applicability of *Manhart's* reasoning to its deferred compensation plan. It also rejected as meritless Arizona's objections to the district court's award of relief, stating that the relief awarded was fully authorized by this Court's decision in *Manhart*. *Id.* at 335-336. This Court granted *certiorari* on October 12, 1982.

C. Petitioners' Contentions

Arizona advances a series of arguments to avoid responsibility for the discriminatory operation of its deferred compensation plan. First, Arizona argues that whatever the intrinsic illegality of sex-discriminatory annuity payments, it bears no legal responsibility for the discriminatory activities of the insurance companies which it has selected to invest and to disburse its employees' deferred compensation funds. Second, Arizona and its supporting *amici* argue that its sex-discriminatory plan does not violate Title VII because: (1) it is based on legitimate actuarial data indicating that women live longer than men as a group; (2) it is purely voluntary; (3) it permits women to avoid the effects of discriminatory annuity payments by opting to receive their deferred compensation in a lump sum payment; (4) it leaves women annuitants no worse off than if they had purchased private annuities in the open market; and (5) it was not intended to discriminate against women. Finally, Arizona argues that, even if its deferred compensation plan violates Title VII, it should not be required to increase the monthly payments of women annuitants to erase the unlawful discrimination.

Each of the courts below held that none of Arizona's arguments serve to validate its provision of discriminatory employee fringe benefits in the form of a deferred compensation plan which treats individual women less favorably than individual men solely because of their sex.

SUMMARY OF ARGUMENT

I.

Solely on the basis of their sex, women employed by petitioner Arizona receive smaller monthly retirement annuity payments under the state's deferred compensation plan than all similarly situated men. Arizona claims that it is not legally responsible for the differential in payments ultimately received by its female employees, because, in its view, it acts as a mere "passive conduit" transmitting employee funds to employee-selected investment vehicles. But Arizona's characterization of its role fails in three respects. First, Arizona derives substantial personnel benefits from the existence of the deferred compensation plan. Second, Arizona itself selected and contracted with insurance companies as funding media for the plan. Third, legal power over the deferred compensation funds rests with Arizona until the time of actual receipt by the employee. Thus, Arizona is considerably more than a "passive conduit" through which employee funds are invested. As an employer which adopted the plan as a valuable fringe benefit designed to attract and retain qualified employees, Arizona bears full responsibility under Title VII for the overtly discriminatory operation of its plan.

Even in the absence of such indicia of responsibility, an employer may not avoid Title VII requirements by delegating the administration of its discriminatory fringe benefit plans to third parties. If the delegatee's activity prevents a Title VII protected group from equal enjoyment of the fringe benefit, the employer must either forego offering such a benefit or devise a mechanism which permits employees to enjoy it equally.

II.

The use of sex-based mortality tables in calculating retirement benefits was rejected in *Manhart* as palpably unfair to individual women employees, and as contrary to the central

goal of Title VII, the eradication of discrimination based on race or sex from the workplace. This Court ruled in *Manhart* that Title VII forbids an employer from utilizing sex-based mortality tables to calculate unequal retirement plan contributions for similarly situated male and female employees. The instant case is its mirror image. In *Manhart*, women were required to pay more for equal retirement benefits. Here, women are required to accept diminished retirement benefits because they did not make the excess payments *Manhart* deemed unlawful.

Arizona does not attempt a frontal assault on the principle that sex-based mortality tables may not be used by an employer in calculating retirement benefits; it relies instead on purported distinctions between this case and *Manhart*, which were properly rejected below. First, Arizona relies on the voluntariness of its plan, suggesting that since no employee need participate, women may avoid the discriminatory aspects of the plan. Once fringe benefits are offered as a part of the employer's compensation package, however, under Title VII they must be made equally available to men and women, whether or not they are voluntary.

Second, Arizona maintains that the existence of a lump sum payment option cures any discrimination inherent in the annuity option. This argument ignores why employees choose to participate in the plan in the first place. Under Title VII, Arizona cannot require women to suffer self-defeating income tax penalties as the price of avoiding a discriminatory annuity schedule.

Third, Arizona contends that since women could not purchase non-discriminatory annuities on the open market, it is justified in utilizing discriminatory annuities in its deferred compensation plan. Such an argument must be rejected as merely a restatement of the discredited notion that Arizona is not responsible for the discriminatory actions of its chosen funding media in administering the plan.

Finally, the contention of Arizona and its supporting *amici* that the state did not violate Title VII because its use of discriminatory annuities was not motivated by a desire to harm

women is erroneous, and flatly inconsistent with numerous prior decisions of this Court. Where, as here, an employer explicitly treats its employees differently on the basis of sex, the critical issue under Title VII is not the existence of a culpable mental state, but the nature of the justification, if any, for the differential treatment. Arizona and its *amici* offer no justification for the explicitly differential treatment which has not already been rejected in *Manhart*.

III.

The courts below found Arizona liable for sex discrimination in violation of Title VII, and granted relief by ordering Arizona to equalize future annuity payments to female retirees. Such an order lies well within the remedial power of the court under Title VII, and is fully justified under this Court's prior decisions.

Requiring employers to provide sex-neutral employee retirement benefits will not "revolutionize the insurance and pension industries" any more than *Manhart* did. Funding requirements for insurance companies need not change. The difference in cost of providing benefits for men and women employees can be taken into account in the payout stage by requiring the employer, as the district court ordered below, to equalize benefits paid to individual employees. Or, an employer seeking to lessen the financial burden of equalizing payments to future retirees could seek an insurance company which factors such costs into sex-merged or "unisex" tables used to compute benefits. Equal payments may then be achieved without additional payments by the employer. These tables are currently available, and will become increasingly common as employers exercise their purchasing power by selecting funding media for their employee benefit plans which respond to market demands for sex-neutral payments.

ARGUMENT

I. ARIZONA IS LEGALLY RESPONSIBLE UNDER TITLE VII FOR THE DISCRIMINATORY ASPECTS OF FRINGE BENEFITS WHICH IT MAKES AVAILABLE TO STATE EMPLOYEES.

Arizona attempts to absolve itself of legal responsibility for the payment of sex-discriminatory retirement benefits by shifting responsibility to the life insurance companies which it chose as funding media for its deferred compensation plan. Under Arizona's view, it acts as a mere "passive conduit" transmitting employee funds to employee-selected investment vehicles and bears no legal responsibility for the differential in payments ultimately received by its female employees. However, as an employer which has adopted a deferred compensation plan as a valuable fringe benefit designed to attract and retain qualified employees, Arizona bears full legal responsibility for the discriminatory features of its plan.[16] Arizona's attempt to portray itself as a mere "passive conduit" breaks down on at least three levels.

First, Arizona derives substantial personnel benefits from the existence of the deferred compensation plan. The earnest lobbying efforts of state and local governments against an IRS proposed revocation of the tax-deferred status of deferred compensation plans such as Arizona's, and in favor of Section 131 of the Revenue Act of 1978 (which authorizes such de-

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16 The state's "affirmative, active participation" in adopting, developing and overseeing the plan, without which "the challenged program could not operate," clearly constitutes involvement sufficient to hold it responsible under Title VII. *E.g., Spirit* v. *TIAA-CREF,* 691 F.2d 1054 (2d Cir. 1982), *aff'g* 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *cert. pet. filed,* Docket No. 82-791 (Nov. 9, 1982); *EEOC* v. *Colby College,* 589 F.2d 1139, 1141 (1st Cir. 1978); *Sobel* v. *Yeshiva University,* 477 F. Supp. 1161, 1166 n.4 (S.D.N.Y. 1979); *see also Peters* v. *Wayne State University,* 691 F.2d 235, 238 (6th Cir. 1982), *cert. pet. filed,* Docket No. 82-794 (Nov. 10, 1982) (Title VII employer cannot avoid its liabilities under the statute by claiming it has selected services which "happen" to discriminate against women).

ferred compensation plans), bears ample witness to the importance of deferred compensation as a fringe benefit capable of attracting highly qualified persons to government service.[17] By adopting the plan, Arizona assured itself the loyal services of employees of both sexes who might otherwise have opted for more highly paid private sector employment. Since Arizona derives valuable personnel benefits from the plan's existence, it can hardly seek to divest itself of the legal responsibility of ensuring that the plan does not discriminate in violation of Title VII.

Second, Arizona has selected the insurance companies which administer the plan and, thus, is responsible for their discriminatory practices.[18] It is conceded that Arizona exercises

17 State and local governments vigorously opposed the proposed regulations and worked with Congress to reverse the IRS proposed action on deferred compensation plans. *See* Prop. Regs. § 1.61-16, 43 Fed. Reg. 4638 (February 3, 1978). Testifying against the IRS proposed regulations, a representative of state and local governments, Bernard Hillenbrand, stated that the proposed regulations would "adversely affect the internal affairs—the employer/employee relationship—of many governments which have established deferred compensation plans." He emphasized that such plans had become a valuable tool that enables public sector employers to offer an employee benefit at no cost to them, and that replacing such plans with an equal financial benefit would be an expensive budget item for state and local governments. (Hillenbrand testified on behalf of the National Association of Counties, National League of Cities, National Conference of State Legislatures, International City Management Association, U.S. Conference of Mayors, National Governors' Association, Council of State Governments, Municipal Officers Association, and the National Public Employer Labor Relations Association.) *See* TAXATION AND FINANCE (BNA) No. 88, at G-15 (May 5, 1978). Congress, thereafter, enacted section 131 of the Revenue Act of 1978 because of its concern that the proposed IRS regulations would "seriously impact upon the employees of many states and localities." *See* S. REP. NO. 95-1263, 95th Cong., 2d Sess. 65, H.R. REP. NO. 95-1445, 95th Cong., 2d Sess. 52-53, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6828, 7090-91.

18 Whatever the funding arrangements, the state retains the ultimate responsibility for providing nondiscriminatory benefits under its employee benefit plans. Employers may, and often do, fund employee fringe benefits, such as health or disability benefits, through group insurance plans. Congress was aware, for example, that enacting the pregnancy discrimination

sole discretion over the selection of investment vehicles for its deferred compensation plan. Despite the obvious discrimination against individual women inherent in the use of sex-based mortality tables, the record reveals that Arizona did not require sex-neutral tables as a condition of insurance company participation in the plan. Indeed, the record shows that Arizona made no attempt to use its influence to attempt to obtain a sex-neutral plan. Instead, it knowingly embraced a plan under which all women employees were consigned to a lower standard of living during their retirement years.

Third, Arizona's attempt to imply that the deferred compensation funds are the property of its employees is, quite simply, incorrect. In order to escape the constructive receipt or economic benefit doctrines and to qualify for deferred compensation treatment under the Internal Revenue Code, Arizona must retain legal title and complete power of disposition over the deferred compensation funds until actual receipt by an employee. Thus, while an employee may suggest that Arizona treat her or his deferred compensation in a given way, legal

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amendment to Title VII in 1978 would increase the cost of employee disability and health insurance plans, and specifically intended that all employees—not just women—would share in the proportionate incremental cost of pregnancy coverage. *See* H.R. REP. NO. 95-948, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD NEWS 4749, 4756-58. Employee pension plans are typically funded through either a group annuity contract offered by a life insurance company, called an insured plan, or through a trust established by the employer and administered through a bank or trust company, sometimes called a trusteed or noninsured plan. *See* A. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS 216-217 (1982). An employer's choice of a funding mechanism for its employee benefit plans does not alter its underlying identity as an employee benefit plan subject to Title VII's requirements. *Cf.* Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 829, Sept. 2, 1974, 29 U.S.C. §§ 1002(1) (definition of employee welfare benefit plan), 1002(2) (definition of employee pension benefit plan). In enacting ERISA, which covers most private pension plans, Congress understood and intended that Title VII applied, and would continue to apply to employee pension plans. *See Legislative History of the Employment Income Security Act of 1974* at 1862, 3518-19 (1976).

power over the funds rests with Arizona. Indeed, it is uncontested that deferred compensation funds remain liable to the claims of Arizona's creditors.

Arizona, therefore, is considerably more than a "passive conduit" through which employee funds are invested. As a principal personnel beneficiary of the plan; as the sole arbiter of which investment vehicles it chooses to rely on; and as the legal owner of the funds, Arizona is responsible for the failure of the plan to conform to the non-discriminatory command of Title VII.

Of course, even in the absence of such indicia of responsibility, Arizona's attempt to avoid the strictures of Title VII by delegating the discriminatory administration of its compensation plans to third persons (who might not fall within the Title VII definition of employer[19]) cannot withstand scrutiny.[20] If, for example, an employer were to offer a form of guaranteed mortgage financing through a specified local bank to senior employees in an effort to induce them to remain in its employ, it could not avoid responsibility under Title VII by arguing that the local bank's discriminatory refusal to lend money to black or women employees was a "third party" decision which rendered the compensation scheme valid. Similarly, if an em-

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19 Unlike cases involving the TIAA-CREF retirement system for employees of educational institutions where the insurer, TIAA-CREF, has been found to be so closely intertwined with the institutions it serves that it has been held to be an "employer" under Title VII, the insurers in the instant case were not joined as parties. *See Spirt* v. *TIAA-CREF*, supra, 691 F.2d 1054, 1063 (2d Cir. 1982), *aff'g* 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979); *but see Peters* v. *Wayne State University, supra*, 691 F.2d 235, 238 (6th Cir. 1982), *rev'g* 476 F. Supp. 1343, 1350 (E.D. Mich. 1979).

20 Under Title VII, an employer cannot do indirectly what it could not do directly. *See Manhart*, 435 U.S. at 718 n.33. An employer could not escape Title VII liability for discriminatory compensation practices, for example, by contracting with a third party paymaster who utilizes a race-based pay scale. *See also Hairston* v. *McLean Trucking Co.*, 62 F.R.D. 642, 662-4 (M.D.N.C. 1974), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975) (discriminatory hiring practices).

ployer were to offer membership in an employer-selected eating club as a part of its compensation package, it could hardly defend itself against a charge of violating Title VII by arguing that the refusal of the club to admit black or women employees was a third-party decision for which the employer bore no legal responsibility. Arizona's deferred compensation plan cannot be distinguished from the "mortgage financing" or "eating club" situations. In each, an employer offers a valuable fringe benefit involving the participation of a specified third person. In each, the third person's activity prevents a Title VII protected group from equal enjoyment of the fringe benefit. In each, the employer must either discontinue the fringe benefit or devise a mechanism which permits both male and female employees to enjoy it equally. What an employer may not do is continue to offer a fringe benefit as an integral part of its compensation package when it is clear that individual members of the workforce are unable to make equal use of that benefit solely because of their race, sex, religion or national origin.

Recognizing Arizona's legal responsibility for the discriminatory practices of its designated funding media in connection with a deferred compensation plan is fully consistent with the general principle that significant legal obligations may not be avoided by delegating the function at issue to a third person. *See* Restatement (Second) Of Agency § 214. In our system, legal obligations are not the equivalent of negotiable paper, to be avoided by simple assignment. In enacting Title VII, Congress imposed upon employers the affirmative obligation of nondiscrimination in the provision of compensation, terms, conditions or privileges of employment, and thereby sought to stimulate self-corrective action on the part of the employers. *See Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-18 (1975). Even passive acquiescence in explicitly discriminatory employment practices cannot relieve an employer of responsibility under Title VIII.[21] Here, Arizona is much

21 An employer (or union) is not relieved of liability under Title VII for discriminatory employment practices performed pursuant to a collective bargaining agreement, for example, even where the other party has ultimate control over the practice because of its greater power in the bargaining

more than a passive observer; it is responsible in both a practical and legal sense for a plan, designed to induce persons to remain Arizona employees, over which it exercises substantial control.

II. DIFFERENTIAL ANNUITY PAYMENTS BASED UPON SEX-BASED MORTALITY TABLES VIOLATE TITLE VII BECAUSE THEY TREAT WOMEN, NOT AS INDIVIDUALS, BUT AS MEMBERS OF A SEX-DEFINED GROUP.

A. This Case Is Governed By *Manhart*.

In *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), this Court ruled that Title VII forbids an employer from utilizing sex-based mortality tables to calculate unequal retirement plan contributions for similarly situated male and female employees. In *Manhart*, Los Angeles required individual women employees to contribute a higher proportion of their salaries to obtain equivalent retirement benefits because, using sex-based mortality tables, women as a group were deemed to live longer than men. This Court ruled that, whatever the actuarial validity of relying on sex-based mortal-

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relationship. *E.g.*, *Robinson* v. *Lorillard Corp.*, *444 F.2d 791, 799 (4th Cir. 1971), cert. dismissed*, 404 U.S. 1006 (1972) ("The rights assumed by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert."); *accord*, *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 850-51 (5th Cir. 1977), *cert. dismissed*, 434 U.S. 801 (1977); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973).

This Court's recent decision in *General Building Contractors Association, Inc.* v. *Pennsylvania*, ___U.S.___, 102 S.Ct. 3141, 73 L.Ed. 2d 835 (1982), relied upon by petitioners, is not to the contrary. In that § 1981 case, the employer had no knowledge that facially-neutral agreements entered into by an employers' trade association, the employers, and the union were administered in a discriminatory manner. The Court held that the employer had not violated its duty under § 1981 to refrain from intentionally denying blacks the right to contract on the same basis as whites. In the instant case, in contrast, the employer contracted for express discrimination against female employees in violation of Title VII. *See* discussion in Part II, *infra* pp. 24-27.

ity tables in computing retirement benefits, Title VII forbids the practice. In response to Los Angeles' contention that sex-based mortality tables were permissible because they provide an accurate predictor of group behavior, this Court noted that the purpose of Title VII was to assure that individuals were to be treated for employment purposes not as members of groups which have historically been the target of discriminatory treatment, but on their individual merits. This Court recognized that even when membership in a race-defined or sex-defined group might be grossly predictive of the group's future behavior, Title VII forbids the use of such devices because they hinder the realization of the Congressional goal embodied in Title VII—the eradication of discrimination based on race or sex from the employment market.[22] If, as Los Angeles unsuccessfully argued in *Manhart* and several of Arizona's supporting *amici* suggest herein, the use of actuarially validated race and sex characteristics were permissible in allocating jobs and compensation under Title VII, we would condemn ourselves to a workforce divided on lines of race and

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22 Some of petitioner's supporting *amici* argue that race should be treated differently from sex for annuity purposes. Title VII forbids such a distinction. The remedial goals of both the race and sex discrimination provisions were strongly reaffirmed by Congress in 1972, when Congress added enforcement provisions and expanded Title VII coverage to include state and local government employees. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103, *see* 42 U.S.C. § 2000e(a) and (f). In explaining the necessity for the 1972 Amendments, the House Committee on Education and Labor observed that "discrimination against women continues to be widespread and is regarded by many as morally or physiologically justifiable." The Committee then specifically rejected the notion that sex discrimination is less serious than other forms of employment discrimination:

> This Committee believes that women's rights are not judicial divertissements. *Discrimination against women is no less serious than other forms of prohibited employment practices* and is to be accorded the same degree of social concern given to any type of unlawful discrimination. (emphasis added).

H.R. REP. NO. 92-238, 92d Cong., 2d Sess. (1971) [To accompany H.R. 1746], *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2141.

sex,[23] precisely the evil Title VII was intended to eliminate. If, for example, race-based actuarial tables were to confirm that members of racial minorities have a lower life expectancy than their Caucasian counterparts, would Title VII tolerate an employment practice which forced black workers to pay higher group life insurance premiums solely because they are black?[24]

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23 Actuarial "equality" by definition depends upon the classifications used to determine values. As explained in Brilmayer, Hekeler, Laycock, and Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 512 (1980):

> . . . It is circular to use the expectancies generated by a predictor to justify using that predictor. This may be illustrated by a simple example.
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> Consider the life expectancy of a newborn black male in South Carolina. Prediction of his life expectancy may or may not take into account his sex, race, and residence. If he is classified as a nonwhite male South Carolinian, his life expectancy is 58.33 years. If he is classified simply as a resident of the United States, his life expectancy is 70.75 years. The other possibilities range in between: he may be a nonwhite male American [60.98], a male American [67.04], a nonwhite American [64.95], or a South Carolinian [67.96]. He has eight different life expectancies—and just on the basis of the three predictors introduced so far.

Thus, the argument that sex-based actuarial tables are not discriminatory because they are "true" proves far too much, since it is virtually certain that every person covered can point to characteristics which actuarially demand lower (and higher) benefits simultaneously.

24 Higher life insurance rates for blacks, once the custom, were justified by insurance companies as "dictated entirely by actuarial findings." *See* M. JAMES, THE METROPOLITAN LIFE: A STUDY IN BUSINESS GROWTH 338 (1947). *See also* Fellers and Jackson, *Non-Insured Pension Mortality: The UP-1984 Table*, PRESENTATION AT THE JOINT PROGRAM CONFERENCE OF ACTUARIES IN PUBLIC PRACTICE, SOCIETY OF ACTUARIES 3 (May 1975). Risk classifications based on race or religion are now generally rejected as contrary to public policy. Nevertheless,one commentator, whose recent article is relied upon by petitioners' supporting *amici*, argues that the additional risk of sickle cell anemia in blacks or Tay-Sachs disease in Jews, which may be reflected in higher mortality rates for those racial and religious or ethnic groups, should be accounted for by charging higher life insurance rates for blacks and Jews. *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489, 511-512 (1982).

Similarly, if religion-based actuarial data were to validate the oft-expressed intuitive belief that Catholics tend to have larger families than Jews, would Title VII tolerate an employment practice which forced Catholic workers to pay higher family health insurance premiums than Jews? In each of the above-cited examples, the use of prohibited group labels to determine individual payments would be impermissible under Title VII, first, because of the perceived unfairness to the healthy black worker with a long life expectancy and the Catholic worker with a small family; and second, because we recognize that the appalling price in racial and religious divisiveness which our society would pay for such a polarization would not begin to justify the marginal increase in cost-efficiency which might arguably flow from the use of actuarially validated racial or religious tables.

The use of sex-based mortality tables in calculating retirement benefits raises precisely analogous issues. First, calculating a woman's life expectancy for retirement purposes solely on the basis of sex, and not on her general health or her use of tobacco or alcohol, is palpably unfair to the 84 percent of individual women who do not live longer than their male counterparts. Second, and perhaps more importantly, using sex-based mortality tables to calculate retirement benefits drives a wedge between men and women by assuring that a woman who works side by side with an identically-situated male will receive smaller monthly benefits after retirement, solely because she is a woman. Just as race and religion-based tables would foment bitterness and divisiveness in the workforce, so sex-based tables perpetuate the second-class status of women workers by guaranteeing that, upon retirement, women retirees will be consigned to a lower standard of living.[25] *Manhart* correctly forbids so retrograde a step.

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25 Older or retired women workers are often *doubly* disadvantaged by discrimination. When women workers who are covered by a pension plan retire (49% of men are covered by a private pension plan on their longest job but only 21% of women), they frequently receive pension benefits based upon discriminatorily depressed wages. *See* CONGRESSIONAL RESEARCH SERVICE REPORT PREPARED FOR THE SUBCOMMITTEE

The instant case is the mirror image of *Manhart*. In *Manhart*, a woman was compelled to pay more for equal retirement benefits. In this case, women are required to accept diminished retirement benefits[26] because they did not make the

ON RETIREMENT INCOME AND EMPLOYMENT OF THE HOUSE SELECT COMMITTEE ON AGING, 96TH CONG., 1ST SESS., WOMEN AND RETIREMENT INCOME PROGRAMS: CURRENT ISSUES OF EQUITY AND ADEQUACY 11 (Comm. Pub. No. 96-190) (1979). On top of that economic disadvantage, retired women receive even lower pension benefits than similarly situated men because of the application of sex-based actuarial tables.

Women receiving pension benefits get lower dollar amounts from both public and private pensions: the median private pension amount in 1976 for men was $2,060 and for women was $1,340, while the median public pension amounts were $4,830 for men and $2,750 for women. *See* WOMEN'S STUDIES PROGRAM AND POLICY CENTER AT GEORGE WASHINGTON UNIVERSITY, OLDER WOMEN: THE ECONOMICS OF AGING 8-12 (1980).

These factors have contributed to the placement of elderly women at the very bottom of the economic ladder in this country. According to U.S. Department of Labor statistics, in 1976, women over 65 had the lowest median income of any sex or age group—$2,800. This figure was approximately one half of the median income for men in that age bracket. In 1977, the median income for women over 65 was $3,087 compared to $5,526 for men.

26 Title VII mandates equal employee retirement benefits as well as equal employee contributions. *See* EEOC's Title VII guidelines, 29 C.F.R. § 1604.9 (f), 37 Fed. Reg. 6835 (April 5, 1972), and 29 C.F.R. § 1604.9 (e); *see also*, EEOC's proposed Equal Pay Act guidelines, Proposed 29 C.F.R. §§ 1620.4 and 1620.5, 46 Fed. Reg. 43848 (September 1, 1981). Unequal provision of retirement benefits have been held to be a violation of Title VII in numerous cases decided prior to this Court's decision in *Manhart*. Plans requiring women to retire earlier than men, or blacks earlier than whites, were found unlawful under Title VII. *Peters* v. *Missouri Pacific R.R.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973) (race); *Bartmess* v. *Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) (sex); *Fillinger* v. *East Ohio Gas Co.*, 4 FEP Cases 73 (N.D. Ohio 1971) (sex). In addition, plans paying lower monthly benefits to male early-retirees have been held unlawful under Title VII. *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973); *Fitzpatrick* v. *Bitzer*, 390 F. Supp. 278 (D. Conn. 1974); *rev'd on other grounds*, 519 F.2d 559 (2d Cir. 1975) (failure to award attorney's fees), *aff'd in part, rev'd in part on other grounds*, 427 U.S. 445 (1976) (failure to award back pay).

excess payments deemed unlawful under *Manhart*. Indeed, as between the two situations, diminished benefits pose a more compelling problem because retired women are so dependent upon periodic retirement payments for economic survival.[27] In *Manhar* , women at the peak of their earning power were shielded from discrimination in calculating their retirement benefits. The same protection must be made available to retired women who can no longer absorb the costs of discrimination by working harder.[28]

B. No Persuasive Distinction Exists Between This Case and Manhart.

Apparently recognizing the wisdom of *Manhart*, Arizona does not attempt a frontal assault on the principle that sex-based mortality tables may not be used by an employer in calculating retirement benefits. Instead, Arizona offers a series of purported distinctions between this case and *Manhart*.

First, Arizona contends that its plan is distinguishable because, unlike the mandatory plan in *Manhart*, Arizona's de-

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27 The fact that the plan at issue here is designed to benefit employees who are relatively highly compensated should not obscure the economic impact that diminished retirement benefits have on the women employees in more typical employee retirement plans designed to provide primary benefits to all covered workers. *See* note 25, *supra*.

28 Virtually every court which has considered the question has held that *Manhart's* reasoning applies with equal or greater force to the unequal payment of employee retirement benefits. *See, e.g., Spirt* v. *TIAA-CREF, supra; Retired Public Employees' Association of California* v. *California*, 677 F.2d 733, 735 (9th Cir. 1982), *cert. pet. filed*, Docket No. 82-262 (August 14, 1982); *Norris* v. *Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330, 334 (9th Cir. 1982), *cert. granted* No. 82-52 (October 12, 1982); *EEOC* v. *Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978); *Probe* v. *State Teachers Retirement System*, 27 FEP Cases 1306 (C.D. Cal. 1981); *Shaw* v. *I.A.M.*, 24 FEP Cases 995 (C.D. Cal. 1980); *see also Sobel* v. *Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979); *Hannahs* v. *New York State Teachers Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981); *Women in City Government United* v. *City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *but see Peters* v. *Wayne State University, supra*, 691 F.2d at 240–41.

ferred compensation plan is voluntary. Since, argues Arizona, no employee need participate, women may avoid the discriminatory aspects of the plan by declining to defer salary. Such an argument is wholly unpersuasive because it forces Arizona's women employees to forego the enjoyment of a valuable fringe benefit—the ability to defer the payment of federal income taxes on a portion of salary—in order to avoid a discriminatory payment schedule. It is no defense to a discriminatory fringe benefit plan to argue that employees may avoid the discrimination by foregoing the benefits offered by the fringe benefit. Thus, were Arizona to offer country club membership in a specified whites-only or men-only club as a fringe benefit, it could hardly escape Title VII liability by arguing that an employee's decision to seek to join the club was purely voluntary. Once fringe benefits are offered as an integral part of an employer's compensation package, under Title VII they must be equally available to both male and female members of the workforce, whether or not they are "voluntary."[29]

Second, Arizona argues that the existence of a lump sum payment option vitiates any possible discrimination inherent in the annuity table. Because a woman may elect to receive her deferred compensation in a lump sum, argues Arizona, she may participate in the deferred compensation plan while shielding herself from any discrimination. This argument ignores, however, the reason why employees—male or female—opt to defer compensation in the first instance. Employees elect deferred compensation because they hope to receive the deferred income (and any interest accrued) at a time when they are in a lower tax bracket. Under Arizona's plan, employees are taxed on the full amount of any deferred funds received in a given tax year. An employee electing a lump sum option must, therefore, pay federal income taxes on the entire lump

29 In early-retirement option cases, for example, male employees have recovered under Title VII for receiving reduced benefits under discriminatory voluntary early retirement options when unreduced, sex-neutral benefits were available under the option of working until normal retirement age. *See Chastang* v. *Flynn & Emrich Company, supra*; *Rosen* v. *Public Service Electric & Gas Co., supra*; *Fitzpatrick* v. *Bitzer, supra*.

sum in the year of receipt. Instead of saving taxes, a lump sum recipient may well be required to pay income taxes on her deferred compensation (and accrued interest) at rates as high—or even higher—than she would have paid had her salary initially have been paid to her in full. The lump sum option, therefore, avoids discrimination only at the cost of the very tax benefits which the deferred compensation plan is designed to provide. Requiring women to suffer self-defeating income tax penalties as the price of avoiding a discriminatory annuity schedule hardly qualifies as a persuasive defense.[30]

Third, Arizona contends that since women could not purchase non-discriminatory annuities in the open-market, it is justified in utilizing discriminatory annuities as part of its deferred compensation plan. Such an argument is merely a restatement of the discredited notion that Arizona is not responsible for the discriminatory actions of its chosen funding media in administering its deferred compensation plan. *See supra* at pp. 11-16. If Arizona wishes to offer fringe benefits, Title VII requires that the plan not treat women adversely because of their sex.[31] If Arizona wishes to offer an annuity

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30 If Arizona offered membership in a specified all male eating club as a fringe benefit, it would hardly constitute a defense to a Title VII case to offer an "option" of eating free at the automat to female employees. Like the automat option, the lump sum option in the instant case does not offer equivalent benefits to women employees. Moreover, even if the lump sum option were a comparable alternative, Title VII clearly forbids providing men with two desirable options while providing women with only one. Furthermore, provision of a non-discriminatory benefit to some women employees cannot legalize discrimination against others. As this court emphasized in *Connecticut* v. *Teal*, __ U.S. __, 102 S. Ct. __, 73 L. Ed. 2d 130, 142 (1982), "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." Unlike *Teal*, there is not even a pretense of bottom line equality in this case.

31 *Amicus* Equal Employment Advisory Council (EEAC) argues in support of petitioners that the plan's group annuity payout option actually places women in an "enchanced payout position", compared to the lump sum purchase of an individual annuity on the open market, and therefore is "*a fortiori* authorized by Title VII when compared to the concededly lawful lump sum payment that is inherently less favorable to female employees."

option as part of its deferred compensation plan it must either assure its sex-neutral operation or itself equalize the discriminatory differential caused by the insurers' use of sex-based mortality tables. Even if Arizona were unable to secure sex-neutral annuities—a contingency which there is no reason to believe could be true—and were unwilling to make up the discriminatory differential, it would be required to find an alternative way of compensating senior officials which does not favor individual men over individual women in violation of Title VII.[32]

Finally, the contention of Arizona and its supporting *amici* that the state did not violate Title VII because its use of discriminatory annuities was not motivated by a desire to harm women is erroneous. First, even in a constitutional context a desire to harm a victim group is not a prerequisite of liability. Invidious discrimination against women has historically been characterized by benign motives, yet that fact has not altered its essential character or mediated its harmful effects. Accordingly, this Court has repeatedly invalidated state statutes or institutional policies treating women differently from men for benign motives related to sexual stereotyping. *E.g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142, 150-152 (1980); *Orr* v. *Orr*, 440 U.S. 268 (1979); *see also Mississippi University for Women* v. *Hogan*, __ U.S. __, 102 S. Ct. __, 73 L.Ed. 2d 1090 (1982). Second, although the district court rejected re-

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EEAC Br. at 13. In essence, EEAC argues that employment discrimination may be excused where women receive better benefits under a group employee plan, despite the discrimination, than they could obtain on the open market. EEAC's position should be rejected as a modern day sex-based equivalent of "plantation" mentality, *i.e.*, women should be grateful for the benefits they receive and not expect equal treatment. Title VII demands that individual women be treated equally in the employment setting, and not as members of some second class group.

32 The record reveals no attempt by Arizona to seek an insurance company willing to offer sex-neutral payment schedules. There is no *a priori* reason why Arizona, with 35,000 employees and over 1,675 plan participants, could not find an insurance company willing to bid on a sex-neutral plan. Arizona's power in the market place is certainly greater than that of any individual. *See also infra* at pp. 28-29.

spondents' Fourteenth Amendment claim, concluding that the requisite "discriminatory purpose" had not been established,[33] the purposeful discrimination required to establish a Fourteenth Amendment challenge[34] is specifically demonstrated by an explicit gender-based classification. As explained in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. at 272-73, in which overtly discriminatory classifications were distinguished from the facially neutral veteran's preference policy at issue in *Feeney*:

> Certain classifications, however, in themselves supply a reason to infer antipathy. Race is a paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification . . . Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.

Where, as here, an employer explicitly treats its employees differently on the basis of sex, the critical issue under Title VII is not the presence or absence of a culpable mental state, but the nature of the justification, if any, for the differential

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33 Petitioners reliance on the district courts holding is misplaced. The district court's constitutional analysis was based on the view that the statute authorizing the state's plan was gender-neutral. In finding no purposeful discrimination, the district court erroneously failed to consider that the state entered into contracts which provided for explicitly sex-based payment of retirement benefits. *See Reilly* v. *Robertson*, 266 Ind. 29, 360 N.E. 2d 171, *cert. denied*, 434 U.S. 825 (1977) (state retirement plan paying women lower periodic benefits than similarly situated men violates state and federal equal protection clauses). The plaintiffs did not appeal the district court's equal protection ruling, and that issue is not before this Court. *See* note 14, *supra*. In any event, this incorrect ruling can have no persuasive or binding effect on this Court's determination of the existence of discrimination under Title VII.

34 *See Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1970); *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976).

treatment.[35] *See Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 711; *Dothard* v. *Rawlinson*, 433 U.S. 321, 332-33 (1977); *see also Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). Unlike many Title VII cases, no issue exists here as to the fact of differential treatment on the basis of sex.[36] The fact that the group annuity contracts entered into

35 The insurance industry practice of computing annuity benefits by using sex-segregated mortality tables constitutes neither a Title VII "business necessity" defense, BFOQ defense, nor a "factor other than sex" defense for the employer. First, the BFOQ defense specified in Section 703 (e), 42 U.S.C. § 2000e-2(e), is available only for certain discriminatory hiring and employing practices, and by its terms is not available as justification for a discriminatory compensation practice. *See Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). Second, the business necessity defense is available only in cases challenging a neutral policy with a discriminatory impact, and was not developed as a justification for explicit race or gender lines. *Id.* Although these defenses are different, a common thread unites them. To prevail once a *prima facie* violation of Title VII has been shown, the employer must minimally establish that the challenged policy is job-related and essential to the safe and efficient operation of the employer's business. The justifications for the use of explicit sex-based classifications advanced by the state completely fail to meet these standards, and petitioners do not formally assert either such defense. Finally, although raised by supporting *amici*, the state does not rely on the "factor other than sex" defense discussed and rejected by the Court in *Manhart*. Instead, the state relies solely on the argument that it is not responsible for the discrimination.

36 Having established the employer's intent to discriminate by proving the use of a sex-based classification, the end point of the analysis used in Title VII disparate treatment cases to "sharpen the inquiry into the elusive factual question of the intentional discrimination" has been reached, and the pretext analysis need not be applied. *See Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n. 8 (1981); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). In disparate treatment cases, a pretext analysis is not apt where the plaintiff "relies chiefly upon direct evidence of discriminatory motive." *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1018 (1st Cir. 1979) (age discrimination case). *See, e.g.*, *Gerdom* v. *Continental Airlines, Inc.*, 692 F.2d 602, 608-610 (9th Cir. 1982) (en banc) (Title VII challenge to facially discriminatory flight hostess weight requirement); *Lee* v. *Russell County Bd. of Education*, 684 F.2d 769, 773-774 (11th Cir. 1982) (§ 1983 race discrimination case); *Muntin* v. *State of California Parks and Recreation Department*, 671 F.2d 360, 361-362 (9th Cir. 1982) (Title VII sex discrimination case); *see also Evans* v. *Harnet County Board of Education*, 684 F.2d 304, 307 (4th Cir. 1982) (Title VII race discrimination case).

by the state utilize sex-based classifications to compute individual employee monthly annuity benefits was never disputed, and is unmistakeably clear from the face of the contracts themselves. As discussed *supra* in Part I at pp. 11-14, the state thereby provided employees with a fringe benefit which explicitly treats employees differently solely because of their sex.[37] The only issue—an issue already decided adversely to Arizona by *Manhart*—is whether the existence of actuarially validated sex-based mortality tables could justify differential treatment. Since that justification defense has already been rejected in *Manhart*, the issue of mental state is simply not relevant to a finding of liability.

III. THE DISTRICT COURT WAS FULLY JUSTIFIED IN ORDERING ARIZONA TO EQUALIZE THE DISCRIMINATORY DIFFERENTIAL IN ANNUITY PAYMENTS TO FEMALE RETIREES.

The courts below found Arizona liable for having operated a discriminatory deferred compensation plan in violation of Title VII. Arizona challenges the remedy, which requires it to equalize future annuity payments to female retirees to eliminate the discriminatory differential. Such an order lies well within the remedial power of the court under Title VII,[38] and is fully

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37 Arizona's reliance on *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 139 (1976) and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) is accordingly misplaced. In *Gilbert* and *Satty*, the Court held that a disability benefits plan or sick pay plan dividing potential recipients into two groups—"pregnant women and non-pregnant persons"—did not classify on the basis of "gender as such." *But see* Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, Oct. 31, 1978, 42 U.S.C. § 2000e(k). In contrast, here the employer has provided an explicitly gender-based fringe benefit.

38 A court that finds unlawful discrimination under Title VII "[m]ay enjoin [the discrimination] . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). *See generally Albemarle Paper Co.* v. *Moody*, 442 U.S. 405 (1975).

justified under the reasoning of this Court's prior decisions. *Manhart, supra,* 435 U.S. at 718-723; *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976); *see also Hutto* v. *Finney,* 437 U.S. 678 (1978).

Contrary to the assertions of Arizona's supporting *amici,* a ruling by this Court upholding the requirement of equal employee retirement benefits would not "revolutionize the insurance and pension industries" or cause the insolvency of pension funds any more than *Manhart* did. Title VII does not make it unlawful "to determine the funding requirements for an establishment's benefit plan by considering the composition of the entire [work] force." *Manhart, supra,* 435 U.S. at 718 n.34. The difference in cost of providing benefits for respective classes of employees can be taken into account in the pay-out stage through factoring such costs into sex-merged or "unisex" tables used to compute benefits,[39] or by requiring employers themselves to equalize benefits paid to individual employees. Accordingly, full relief under Title VII can be achieved without requiring insurance companies or other funding media to change current funding requirements for employee group annuity plans.

In this case, because the employer funded its plan through third party independent insurance companies who were not parties to the action, the court properly ordered the employer to equalize future benefits to female retirees. The present cost burden imposed on Arizona by the court's order is minimal; as of August 1978, only four retired women had selected a lifetime annuity pay-out option. Nevertheless, Arizona, and other employers offering such plans, may avoid future adverse financial consequences by using their group purchasing power to obtain sex-neutral annuity payments for future retirees, and

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39 *See generally* Fellers and Jackson, *supra* note 24. The sex-merged or composite mortality table described therein is appropriate for valuation of pension plans covering groups having 10-30% female employees, if used without adjustment. The table can be set back or set forward for use with groups with a different male-female percentage. The authors correctly note that "use of a composite table for the actuarial valuation of pension benefits should not be considered less accurate or less scientific than the use of sex-segregated mortality tables." *Id.* at 28. *See also* note 23, *supra.*

by shifting the deferred compensation funds (to which they hold title) to funding vehicles that are prepared to offer annuities which do not discriminate on the basis of sex. In that event, those insurance companies prepared to respond to the market demands of such employers will benefit from the employers' desire to avoid the necessity of equalizing individual employee retirement benefits.

Arizona's supporting *amici* do not maintain that insurance companies are unable to respond to such market demands. Sex-merged or unisex actuarial tables are not difficult to design, and are used in many large defined benefit plans for valuation purposes and for computation of joint and survivor option benefits.[40] Unisex tables have also been constructed for use in insured defined contributions plans.[41] Adverse selection by male employees, an objection to the use of unisex tables raised by the insurance industry, would be virtually nonexistent in a deferred compensation plan such as Arizona's where the tax advantages of the group annuity option overwhelmingly outweigh any countervailing benefit of opting out with a lump sum payout.

In sum, the relief ordered in the instant case should be affirmed as fully consistent with the remedial purposes of Title VII, and with this Court's decision in *Manhart*.

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40 *See* Fellers and Jackson, *supra* note 24, at 29.

41 TIAA-CREF, for example, has constructed a merged gender or unisex mortality table for computation of benefits in defined contribution plans designed for educational institutions. As explained in *Spirt* v. *TIAA-CREF, supra,* that unisex table, approved by the EEOC, has not been implemented. Recently, the University of Minnesota replaced its TIAA-CREF retirement plan with a new plan (Group Annuity Contract No. G-1130-1) administered by two private insurance companies (Minnesota Mutual Life Insurance Company and Northwestern National Life Insurance Company) using a unisex table to calculate retirement benefits. *See U. of Minnesota Adopts Unisex Plan for Pensions: "Right Thing to Do,"* CHRONICLE OF HIGHER EDUCATION 25 (October 13, 1982).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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The *American Civil Liberties Union* (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The Women's Rights Project of the ACLU was established to help eliminate the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases challenging sex discrimination in employment, including discrimination against women in employee retirement plans.

The ACLU participated as *amicus curiae* in *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), in which this Court held that the employer practice of withholding more from women's salaries than from similarly situated men's salaries for pension plan contributions constituted unlawful sex discrimination under Title VII. ACLU attorneys represent the plaintiffs-appellees-petitioners in *Peters* v. *Wayne State University and TIAA-CREF*, 476 F. Supp. 1343 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, No. 82-794 (November 10, 1982), a Title VII challenge by female employees and retirees to the University's provision, through TIAA-CREF, of lower periodic retirement benefits to women than to similarly situated men, and have participated on behalf of *amici curiae* in *Spirt* v. *TIAA*, 475 F. Supp. 1298 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, No. 82-791 (November 10, 1982).

Women's Equity Action League (WEAL) is a national nonprofit membership organization dedicated to securing legal and economic rights for women, particularly within educational institutions, and to addressing the economic problems of women as they grow older. WEAL conducts research, public education, administrative and legislative advocacy on the issues of social security, private pension reform, and insurance discrimination.

The *Pension Rights Center* is a nonprofit, tax-exempt, public-interest organization established in 1976 for the purposes of educating the public about pension issues, protecting

the pension rights of workers, retirees and their families, and developing solutions to the nation's retirement income problems. The Center's goal is a retirement income system that is fair, adequate and responsive to the needs of individuals and the economy.

The *Women's Legal Defense Fund*, founded in 1971 by women attorneys in Washington, D.C., is a nonprofit, tax-exempt organization dedicated to combatting discrimination on the basis of sex, especially in the area of employment discrimination. The fund, in providing pro bono legal assistance to women, devotes a major portion of its resources to combatting sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, and advocacy before federal agencies charged with enforcement of equal employment opportunity laws.

Women Employed is an organization of working women located in the City of Chicago. Its members work at all levels of employment in banks, insurance companies, stock brokerages, engineering firms, law offices, the government, and in all types of corporations. Women Employed has a two-fold purpose: 1) exposing employers' discriminatory practices and seeking appropriate remedies either through direct negotiations, or where necessary, by filing charges with government agencies; 2) monitoring those government agencies to ensure that working women's rights are protected. It has assisted individuals in filing charges covering all types of discrimination, including that in employee benefit packages.

Equal Rights Advocates, Inc., is a San Francisco based public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. Two major concerns of the lawyers and members of the board of ERA, Inc. are the establishment of gender-based equality in the workforce and the elimination of sex-based actuarial tables used to determine rates and coverage for insurance and pension plans. Their activities in

this regard include representation of women who challenge the use of sex-based actuarial tables to determine disability insurance rates, *Life Ins. Co. of North America* v. *Reichardt*, 591 F.2d 499 (9th Cir., 1979), as well as numerous class action cases brought under Title VII of the Civil Rights Act of 1964, e.g., *Kouba* v. *Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) and *Bauman* v. *U.S. District Court*, 557 F.2d 650 (9th Cir. 1977).

The *National Women's Law Center* provides legal representation to protect and advance women's rights before federal administrative agencies and courts. The Center has placed a particular emphasis on addressing problems of sex discrimination in employment and insurance, including fringe benefit plans which differentiate on the basis of sex. The Center has participated as an *amicus curiae* in many of the cases involving sex discrimination in this Court.

The *American Association of University Women* (AAUW) is a national organization of 190,000 college educated women working for the advancement of women. Dedicated for 100 years to promoting the social and economic well being of all persons, the AAUW has affirmed its commitment to improving the economic situation of American women through support of equitable pension programs.

The *American Jewish Committee* (AJC) is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans. Specifically, AJC supports equal rights under the law for women and are committed to the elimination of all gender-based discrimination.

The *New York County Lawyers' Association*, an organization of almost 11,000 lawyers who practice in the City and State of New York, has since its founding in 1908 been an active force in the promulgation of laws ensuring civil rights, political equality, and equal justice. It admitted women to membership from its inception, and in 1972 it established a Special Committee on Women's Rights, which received permanent status last year. For over ten years, this Committee has

engaged in numerous activities designed to eliminate discrimination against women, including appearing as *amicus curiae* in litigation affecting the rights of women in federal and state courts.

The Committee on Women's Rights has been closely following the cases challenging the use of sex-based mortality tables in calculating the periodic annuity benefits available to employees under defined contribution pension plans, and believes that affirmance of the decision below is of critical importance to women.

The *Displaced Homemakers Network, Inc.*, organized in 1978, is a national nonprofit organization of displaced homemakers, displaced homemaker service providers and other supporters. The organization's purposes are to work toward economic self-sufficiency for displaced homemakers through employment, and to provide resource materials for and communication linkages among programs and individual members to help solve the special needs of a growing group of middle-aged and older women.

The *Northwest Women's Law Center* is a nonprofit public interest law organization dedicated to securing equal rights for women through law. Located in Seattle, the Law Center conducts community and continuing legal education programs throughout the Northwest on women's legal rights; offers information and referral, and advice and counseling services; and provides legal representation or assistance in selected cases that will impact the laws and legal rights of large numbers of women.

The *National Women's Political Caucus* is a nationwide, multipartisan organization with 73,000 members in over 300 state and local Caucuses, dedicated to obtaining equal representation of women in elective and appointive office and to speaking out on issues of direct concern to women. The elimination of sex-based employment and economic discrimination has been a central concern of the National Women's Political Caucus since its founding in 1971.

The *American Jewish Congress* is a national organization of American Jews established in 1917 which has pursued as one of

its most important tasks the achievement of equality for all Americans. In furtherance of this goal, it has filed numerous briefs in opposition to invidious discrimination based on sex.

The *National Federation of Business and Professional Women's Clubs, Inc.* (BPW) promotes full participation, equity and economic self-sufficiency for working women. Founded in 1919, BPW is the oldest and largest organization representing the interests of working women, with over 155,000 members in 3,700 clubs nationwide. Respondent Nathalie Norris is a member in good standing of BPW. Each year, the membership of BPW adopts a National Platform at its Convention. This year's platform includes planks on "equal treatment for women in all areas of employment" and "equal treatment of women and men, regardless of marital status in all phases of economic life, with special emphasis on the elimination of discrimination in insurance."

The *National Council of Jewish Women*, a volunteer organization of 100,000 members committed to advancing human welfare, believes that all laws, benefits, and programs must not discriminate based on sex.

The *Women's American ORT* is an American Jewish organization of 145,000 members which is concerned with gender equality in all economic spheres.

Coal Employment Project is a nonprofit corporation which has been working since 1977 to assist women break the barriers of discrimination in the coal industry. This has involved working on many issues of importance to women workers generally, including discriminatory employee group annuity plans.

Federally Employed Women's Legal and Education Fund, Inc., is a nonprofit national organization, incorporated in 1977 under the laws of the District of Columbia. It was established to meet the special problems encountered by federal government employees in eliminating unlawful employment discrimination. The Fund offers education, counseling and collateral support, including *amicus curiae* and, where appropriate, direct participation in litigation on behalf of government employees seeking to assert their rights under federal employment discrimination laws.

The *American Veterans Committee, Inc.* (AVC) is a nationwide organization of veterans who served honorably in the Armed Forces of the United States during World Wars I and II and the Korean and Vietnam Conflicts. AVC, founded in 1943, has both men and women members who participate in AVC's affairs in full equality. Its members are associated, regardless of race, color, religion, sex or national origin, to promote the principles of democracy for which they fought, including the elimination of racial and gender discrimination. AVC believes that any such discrimination is detrimental to our national welfare, both at home and abroad. In pursuance of this belief, AVC has participated in many cases before this Court.

The *Older Women's League* (OWL) is a national grass-roots advocacy organization, working for changes in public policy to address the special needs of older women. Since income adequacy is one of their primary concerns, and since less than one older woman in five receives any pension benefits, OWL supports policies that will help them have access to equitable pension income.

Americans for Democratic Action (ADA), organized in 1947, is an independent political and legislative action organization which supports equal rights for women and minorities, including the right to full equality in the workplace.

The *NOW Legal Defense and Education Fund* (NOW LDEF) is a nonprofit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization of over 200,000 men and women in more than 750 chapters throughout the United States. A major goal of the NOW LDEF is to eradicate barriers that deny women economic opportunities and economic security. In furtherance of that goal, NOW LDEF has participated in cases to eliminate discriminatory practices that deprive women and their families equal pension and insurance benefits.